12-535

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1371.

THE THORN WIRE HEDGE COMPANY, J. W. CALKINS, AARON K. STILES AND GARY G. CALKINS, PLAINTIFFS IN ERROR,

vs.

CASSIUS D. FULLER AND BURT G. PATRICK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED APRIL 4, 1887.

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1 STATE OF MINNESOTA, *County of Freeborn:*

District Court, Tenth Judicial District.

CASSIUS D. FULLER and BURT G. PATRICK, Plaintiffs,
against
JACOB LARSEN, Defendant, and THORN WIRE HEDGE COMPANY, J. W. CALKINS, AARON K. STILES, and GARY G. CALKINS, Interveners.

And now, upon reading the complaint of the plaintiffs herein and upon reading and filing the petition — the above-named interveners and approving and filing the bond of the interveners in the above-entitled action for the removal of said suit into the circuit court of the United States—

Ordered, That said petition and bond be, and they are hereby, accepted, and that said suit be, and the same hereby is, removed from the district court of Freeborn county for the tenth judicial district, in the State of Minnesota, into the next circuit court of the United States for the district of Minnesota, and that no further proceedings be had therein in said district court.

Dated November 23rd, A. D. 1886.

JOHN Q. FARMER,
Judge of the District Court.

2 STATE OF MINNESOTA, *County of Freeborn:*

District Court, Tenth Judicial District.

CASSIUS D. FULLER and BURT G. PATRICK, Plaintiffs,
against
JACOB LARSEN, Defendant, and THORN WIRE HEDGE COMPANY, J. W. CALKINS, AARON K. STILES, and GARY G. CALKINS, Interveners.

Know all men by these presents that we, Thorn Wire Hedge Co., J. W. Calkins, Aaron K. Stiles, and Gary G. Calkins, as principals, and G. Gulbrandson and D. W. Dwyer, as sureties, are held and firmly bound unto Cassius D. Fuller and Burt G. Patrick, plaintiffs above named, in the sum of two hundred and fifty dollars, lawful money of the United States of America, to be paid to the said Cassius D. Fuller and Burt G. Patrick, their executors, administrators, or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated the 22nd day of November, one thousand eight hundred and eighty-six.

3 The condition of the above obligation is such that whereas a suit was brought, on or about the — day of October, 1886, in the district court, county of Freeborn, State of Minnesota, by said Cassius D. Fuller and Burt G. Patrick against Jacob Larsen, sheriff of said county of Freeborn, in which action the said Thorn Wire Hedge Company, J. W. Calkins, Aaron K. Stiles, and Gary G.

Calkins have intervened and are the real parties in interest as defendants therein, which said action is now pending in said county and is removable into the circuit court of the United States for the district of Minnesota:

Now, therefore, if the said Thorn Wire Hedge Company, J. W. Calkins, Aaron K. Stiles, and Gary G. Calkins shall enter or cause to be entered in said circuit court of the United States for the district of Minnesota, on the first day of its next stated session, a copy of the record in said suit, and shall pay all costs that may be awarded by said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and do or cause to be done all such other appropriate acts as by the statutes of the United States are required to be done upon the removal of a suit into the United States circuit court, then the above obligation to be void; otherwise to remain in full force and virtue.

THE THORN WIRE HEDGE COMPANY,
By J. W. CALKINS, *Pres't.*
JNO. W. CALKINS. [SEAL.]
AARON K. STILES, [SEAL.]
By JNO. W. CALKINS, *His Agent.*
GARY G. CALKINS, [SEAL.]
By JNO. W. CALKINS, *His Agent.*
G. GULBRANDSON. [SEAL.]
D. W. DWYER. [SEAL.]

Sealed and delivered in presence of—
HENRY A. MORGAN.
D. F. MORGAN.

4 STATE OF MINNESOTA, } ss:
County of Freeborn, }

J. W. Calkins and G. Gulbrandson and D. W. Dwyer came personally before me on this 22nd day of November, A. D. 1886, to me well known to be the same persons who executed the foregoing bond, and each acknowledged the same to be his own free act and deed; and the said J. W. Calkins then and there acknowledged that he executed the said bond for and on behalf of said Thorn Wire Hedge Company as the president thereof, and for and on behalf of said Aaron K. Stiles and Gary G. Calkins and each of them as their duly authorized agent, freely and voluntarily.

[SEAL.] HENRY A. MORGAN,
Notary Public, Freeborn County, Minnesota.

STATE OF MINNESOTA, } ss:
County of Freeborn, }

G. Gulbrandson and D. W. Dwyer, being first duly sworn, doth say, each for himself, that he is the same person as the surety above named, and is a resident and freeholder of and in the State of Minnesota, and worth the sum of two hundred and fifty dollars above

his debts and liabilities and exclusive of his property exempt from execution.

G. GULBRANDSON.
D. W. DWYER.

Subscribed and sworn to before me on this 22nd day of November, A. D. 1886.

[SEAL.] HENRY A. MORGAN,
Notary Public, Freeborn Co., Minn.

5 *Summons.*

STATE OF MINNESOTA, *County of Freeborn:*

District Court, Tenth Judicial District.

CASSIUS D. FULLER and BURT G. PATRICK, Plaintiffs,
against
JACOB LARSON, Defendant.

The State of Minnesota to the above-named defendant:

You are hereby summoned and required to answer the complaint in the above-entitled action, a copy of which is herewith served upon you, and to serve a copy of your answer to the said complaint on the subscriber, at his office, in the city of Albert Lea, in the county of Freeborn and State aforesaid, within twenty days after the service of this summons on you, exclusive of the day of such service, and if you fail to answer the said complaint within the time aforesaid the plaintiffs in this action will have the amount they are entitled to recover ascertained by the court or under its direction, and take judgment for the amount so ascertained.

Dated Oct. 12, A. D. 1886.

JOHN WHYTOCK,
Plaintiffs' Attorney, Albert Lea, Minn.

6 *Complaint.*

STATE OF MINNESOTA, *County of Freeborn:*

District Court.

CASSIUS D. FULLER and BURT G. PATRICK, Plaintiffs,
against
JACOB LARSON, Defendant.

The said plaintiffs, complaining of the said defendant, allege—

1. That during all the time hereinafter mentioned the said plaintiffs were partners doing business at the city of Albert Lea, in said county, as hardware merchants under the firm name and style of Fuller & Patrick.

2. That on or about the 15th day of June, 1886, the said plaintiffs were the owners and in possession of that certain stock of goods and merchandise then being in the brick store occupied by them on

Broadway, in said city, as a hardware store, said stock then and there consisting of hardware, tinners' goods, paints, and other articles comprising a general stock and assortment of the hardware and supplies, and the said stock was then of the value of four thousand dollars, and the said plaintiffs being so in possession the said defendant wrongfully and maliciously entered said premises and seized, took, and carried away said goods and merchandise and converted the same to his use.

7 3. Further complaining, the said plaintiffs allege that at the time aforesaid the said defendant wrongfully and wantonly took possession of the said store and stock and has kept and retained possession thereof ever since, and that during all said times the said plaintiffs, by reason of the wrongful and malicious acts aforesaid, have been and are deprived of their said trade and business, and the same has been broken up and destroyed, and their good will and credit therein injured: that at and during the time aforesaid, and prior thereto, the said business was good, valuable, and profitable, and the sales therein would and did average forty dollars per day for each day, and the actual and reasonable gains and profits thereof were thirty-three and one-third per cent. on the dollar during said time; that the actual and reasonable profits aforesaid would have been had and continued from said 15th day of June to the commencement of this action and during all the time of the interruption and disturbance of said business; that the value of the said gains and profits were and would have continued to be 33⅓ per cent. on the sales aforesaid during said interruption and disturbance, and that the reasonable value of said business over and above the expenses thereof was $3,000 per year; that said plaintiffs have, by the wrongful acts aforesaid, been damaged by said defendant in the sum of $10,000.

Said plaintiffs further say that before the commencement of this action they duly demanded of said defendant and caused to be duly demanded of him the return and delivery of said property to them, and duly notified him of their claim thereto, which said defendant refused and neglected to do.

8 Plaintiffs demand judgment against said defendant in the sum of ten thousand dollars, and their costs and disbursements herein.

Dated Oct. 12, 1886.

JNO. WHYTOCK,
Att'y for Plaintiffs.

STATE OF MINNESOTA, } ss:
County of Freeborn, }

Burt G. Patrick, of said county, being duly sworn, says he is one of the plaintiffs in this action, and that the foregoing complaint is true, to deponent's own knowledge, except as to those matters which are therein stated on his information and belief, and as to those matters that he believes it to be true.

B. G. PATRICK.

Subscribed and sworn to before me this 13th day of Oct., 1886.

E. C. STACY,
City Justice of the City of Albert Lea, Minn.

Filed Nov. 23rd, 1886.

GEO. T. GARDNER,
Clerk of the District Court.

9. *Answer.*

STATE OF MINNESOTA, *County of Freeborn:*

District Court, Tenth Judicial District.

CASSIUS D. FULLER and BURT G. PATRICK, Plaintiffs,
against
JACOB LARSON, Defendant.

Now comes the above-named defendant, and, for his answer to the complaint of the plaintiffs in the above-entitled action—

1. Denies each and every allegation, matter, fact, and thing in said complaint contained, and each and every part and portion thereof not hereinafter expressly admitted, qualified, or answered unto.

2. Further answering said complaint, said defendant denies that said plaintiffs have been damaged by any act of his in any sum whatever, either as alleged in said complaint or at all.

3. Further answering said complaint, said defendant alleges that heretofore, to wit, on or about the 23rd day of May, A. D. 1884, one George A. Patrick made, executed, and delivered to the Thorn Wire Hedge Company, a corporation of the State of Illinois, doing business therein under said corporate name, his certain promissory note in writing, dated on said day, due July 23rd, A. D. 1884, whereby, for value received, he promised and agreed to pay said Thorn Wire Hedge Company the sum of $204.49 on said 23rd day of July, A. D. 1884, with interest thereon at the rate of eight per cent. per
10 annum from maturity thereof until paid.

4. That said George A. Patrick wholly failed, neglected, and refused to pay said note or any part thereof.

5. That heretofore, to wit, on the 20th day of February, A. D. 1884, said George A. Patrick made, executed, and delivered to said Thorn Wire Hedge Company his certain other promissory note in writing, dated on said —, whereby, for value received, he promised and agreed to pay said Thorn Wire Hedge Company the sum of $200.00 on the first day of July, A. D. 1884, with interest thereon at the rate of seven per cent. per annum from date until paid.

6. That said George A. Patrick wholly failed, neglected, and refused to pay said note or any part thereof.

7. That heretofore, to wit, on said 20th day of February, A. D. 1884, said George A. Patrick made, executed, and delivered to said Thorn Wire Hedge Company his certain other promissory note in writing, dated on said day, whereby, for value received, he promised and agreed to pay said Thorn Wire Hedge Company the sum of

$500 on the first day of September, A. D. 1884, with interest thereon at the rate of seven per cent. per annum from date until paid.

8. That said George A. Patrick wholly failed, neglected, and refused to pay said note or any part thereof.

9. That heretofore, to wit, on said 20th day of February, A. D. 1884, said George A. Patriek made, executed, and delivered to said Thorn Wire Hedge Company his certain other promissory note in writing, dated on said day, whereby, for value received, he promised and agreed to pay said Thorn Wire Hedge Company the sum of $500 on the first day of October, A. D. 1884, with interest thereon at the rate of seven per cent. per annum until paid.

11 10. That said George A. Patrick wholly failed, neglected, and refused to pay said note or any part thereof.

11. That heretofore, to wit, on said 20th day of February, A. D. 1884, said George A. Patrick made, executed, and delivered to said Thorn Wire Hedge Company his certain other promissory note in writing, dated on said day, whereby, for value received, he promised to pay said Thorn Wire Hedge Company the sum of $500.00 on the first day of December, A. D. 1884, with interest thereon at the rate of seven per cent. per annum until paid.

12. That said George A. Patrick wholly failed, neglected, and refused to pay said note or any part thereof.

13. Further answering said complaint, said defendant alleges that thereafter and on the 16th day of September, A. D. 1885, said Thorn Wire Hedge Company duly commenced an action in this court against George A. Patrick to recover the full amount due on said notes, and each and all of them above described; that the summons in said action was duly and personally served on said George A. Patrick, and thereafter such proceedings were duly had and rendered in said action that on the 7th day of October, A. D. 1885, judgment was duly rendered, entered, and docketed in said district court in and for said county of Freeborn in said action in favor of said Thorn Wire Hedge Company as plaintiff therein and against said George A. Patrick as defendant therein, for the sum of $1,994.91 debt, interest, and costs of that suit.

14. That thereafter and on or about the 29th day of June, A. D. 1886, said judgment then remaining wholly unpaid and unsatisfied, except $500.00 paid thereon October 17th, 1885; $422.60 paid thereon December 31st, 1885, and $100.00 paid thereon about

12 April 29th, 1886, the said Thorn Wire Hedge Company as plaintiff aforesaid caused and procured an execution in due form to be issued out of said court, under the seal thereof, on said judgment, directed to this defendant, who was then, ever since has been, and now is, the duly elected, qualified, and acting sheriff of said county of Freeborn and State of Minnesota, commanding this defendant as such sheriff to satisfy said judgment and execution out of the personal property of said judgment debt of George A. Patrick within said county of Freeborn, or if sufficient personal property could not be found, then out of the real property in said county belonging to said judgment debtor on the day when said

judgment was so docketed in said county, or at any time thereafter, not exceeding ten years.

15. That pursuant to said execution and under and by virtue thereof, and not otherwise, on the 12th day of June, A. D. 1886, this defendant as such sheriff duly levied upon the property mentioned in the complaint herein as the property of said G. A. Patrick.

16. That this defendant hereby refers to the summons, complaint, execution, and records and proceedings now on file and of record in the office of the clerk of this court, and hereby makes them a part of this answer.

17. That said plaintiffs herein claim the goods and property described in the complaint by and through a pretended and fraudulent transfer from said George A. Patrick to said plaintiffs, which said pretended and fraudulent transfer from said George A. Patrick to said plaintiffs was, as said defendant is informed and believes, made with the intent and purpose on the part of said George A. Patrick and said plaintiffs of hindering, delaying, and defrauding the creditors of said George A. Patrick, and particularly said
13 Thorn Wire Hedge Company, whose demand and claim existed before said pretended transfer was made, and was subsisting at the time thereof against said George A. Patrick, and as said defendant is informed and believes, the said George A. Patrick and said plaintiffs fraudulently and secretly made such pretended and fraudulent sale and transfer with the intent and purpose of hindering, delaying, and defrauding said Thorn Wire Hedge Company and the other creditors of said George A. Patrick of their just claims and obligations against said George A. Patrick.

18. That said pretended sale and transfer was made without any consideration and without any actual or real change of possession of said property between said George A. Patrick and said plaintiffs.

19. That during and at the time of said pretended sale and transfer said George A. Patrick was insolvent and irresponsible, which fact was well known to said plaintiffs.

20. That all of said parties were then related to each other, acting in collusion and in privity with each other, and conspired together in all said matters with intent to cheat and defraud said Thorn Wire Hedge Company and the other creditors of said George A. Patrick, in whose name all of the merchandise aforesaid had been purchased.

21. That said plaintiffs, Cassius D. Fuller and Burt G. Patrick, in instituting this action, merely represent and act as the secret and fraudulent agents of said George A. Patrick, and for his exclusive use and benefit.

22. That when attached and levied upon as aforesaid the property aforesaid was the property of said George A. Patrick, as to said Thorn Wire Hedge Company and the other creditors of said George A. Patrick, and said pretended transfer thereof by said
14 George A. Patrick to said plaintiffs was secret, without consideration, fraudulent, sham, and void.

23. That pursuant to said levy so made on said 12th day of June, A. D. 1886, under and by virtue of said execution, and upon and

after due notice, as provided by law, to wit, between the 31st day of July and the 15th day of August, A. D. 1886, said defendant, as such sheriff, proceeded to sell and did sell a sufficient amount of said property to pay the sum due on said judgment, with interest and costs, to wit, $1,464.46, and that thereafter, and on or about the 12th day of September, A. D. 1886, he delivered the balance of said property described in the complaint to George T. Gardner, he, the said George T. Gardner, being then and there the duly appointed, qualified, and acting receiver of the goods, chattels, property, and estate of said George A. Patrick, and the said George T. Gardner being then and there entitled to the possession of the said goods and property so delivered to him as aforesaid.

24. That the value of the said property described in said complaint, and so sold by said defendant under said execution, did not exceed the sum of $1,464.46, for which the same was sold as aforesaid, and that the value of the property so delivered to said George T. Gardner, as aforesaid, did not exceed the sum of $500.00.

Wherefore said defendant demands that said action be dismissed, and that he recover his costs herein.

LOVELY, MORGAN & MORGAN,
Attorneys for Defendant,
Albert Lea, Minn.

STATE OF MINNESOTA, } *ss:*
County of Freeborn, }

Jacob Larson, of said county, being duly sworn, says he is
15 the defendant in this action, and that the foregoing answer is true to deponent's own knowledge, except as to those matters which are therein stated on his information and belief, and as to those matters that he believes it to be true.

JACOB LARSON.

Subscribed and sworn to before me this 13th day of November, 1886.

HENRY A. MORGAN,
Notary Public, Freeborn County, Minn.

Filed Nov. 23, 1886.

GEO. T. GARDNER,
Clerk of the District Court.

16 *Reply.*

STATE OF MINNESOTA, *County of Freeborn:*

In District Court.

CASSIUS D. FULLER and BURT G. PATRICK, Plaintiffs,
against
JACOB LARSON, Defendant.

The said plaintiffs, replying to the new matter set forth and contained in the answer of the defendant in the above-entitled action—

1. Deny each and every allegation of said new matter and each and every part thereof excepted as hereinafter expressly admitted or qualified.

2. Said plaintiffs, further replying to said new matter and to the paragraphs contained in said answer and numbered seventeen, eighteen, nineteen, twenty, twenty-one, and twenty-two, deny each and every allegation and matter and each and every portion thereof set forth and contained in said paragraphs and in each and every of them. They deny that at the time or times alleged in said paragraphs or at any other time there was any fraud or collusion or fraudulent act, intent, or purpose in any transfer of any goods or property as alleged in said paragraphs; and they further deny that there was at said times or at any other time any fraudulent act, transfer, intent, or purpose between the George A. Patrick named in said paragraphs and these plaintiffs in respect to any act,
17 transfer, or possession in and about the stock or property described in their complaint in this action or in any other manner whatever in that behalf, but they allege that they were the owners and in possession of the said goods and property during all the time mentioned in said complaint, in good faith and for a valuable consideration. They further deny that there was any fraud or secrecy or pretended sale or transfer of the said property between said George A. Patrick and these plaintiffs at the time in said paragraphs alleged or at any time or in any manner whatever.

3. Further replying to said new matter and to the allegations and matters set forth in paragraph numbered twenty-three of said answer, said plaintiffs deny that said defendant, as sheriff or otherwise, levied on the property therein mentioned under the execution therein alleged, on the 12th day of June 1886; that as to whether the said defendant at the time alleged in said last paragraph, or at any time, delivered any of the property described in said last paragraph to the George T. Gardner therein named, they have no knowledge or information thereof sufficient to form a belief, but these plaintiffs allege, on their information and belief, that said defendant, after the alleged sale by him, kept and retained in his possession and control a large portion of the property belonging to these plaintiffs, to wit, in the amount and value of more than fifteen hundred dollars; they deny that said Gardner had any right or title to said property or any portion thereof.

4. Said plaintiffs, further replying to the new matter set forth in said answer and to the new matter contained in the paragraphs numbered 13 and 14 of said answer, allege that they have been informed that an action was commenced, a judgment afterwards entered, and an execution afterwards issued against said George
18 A. Patrick.

Dated Nov. 13, 1886.

JNO. WHYTOCK,
Plaintiffs' Attorney.

STATE OF MINNESOTA, } ss:
County of Freeborn, }

Cassius D. Fuller, of said county, being duly sworn, says he is one of the plaintiffs in this action, and that the foregoing reply is true to deponent's own knowledge, except as to those matters which are therein stated on his information and belief, and as to those matters that he believes it to be true.

CASSIUS D. FULLER.

Subscribed and sworn to before me this 18th day of Nov., A. D. 1886.

[SEAL.]

D. R. P. HIBBS,
Notary Public, Minn.

Filed Nov. 23, 1886.

GEO. T. GARDNER,
Clerk of the District Court.

19 *Petition for Intervening Defendants.*

STATE OF MINNESOTA, } ss:
County of Freeborn, }

In District Court, 10th Judicial District.

CASSIUS D. FULLER and BURT G. PATRICK, Plaintiffs,
against
JACOB LARSON, Defendant, and THORN WIRE HEDGE COMPANY, J. W. CALKINS, AARON K. STILES, and GARY G. CALKINS, Interveners.

To said court:

This petition of the intervening defendants in the above-entitled action, Thorn Wire Hedge Company, J. W. Calkins, Aaron K. Stiles, and Gary G. Calkins, respectfully shows:

1. That said action is one of a civil nature at law, and the same is now pending in the State court above specified, and the matter and amount in dispute therein, respectively, exceeds, exclusive of costs, the sum of five hundred dollars, as will more fully appear by the pleadings in said action, to which reference is hereby made for greater certainty.

2. That said plaintiffs and the defendant, Jacob Larson, are, and ever since a time anterior to the commencement of said action have been, citizens of the State of Minnesota.

20 3. That said petitioners and each of them are, and ever since a time anterior to the commencement of said action have been, citizens of the State of Illinois.

4. That said action was brought by said plaintiffs to recover of and from said defendant therein, Jacob Larson, as the sheriff of the county of Freeborn, in the State of Minnesota, damages for the alleged wrongful taking, detention, and sale of certain specified personal property alleged by said plaintiffs to have been their property then and there.

5. That such taking, detention, and ultimate sale thereof were all done by said Jacob Larson in his official capacity as such sheriff and at the request of your petitioners and by virtue of a writ of execution duly allowed and issued out of the district court of the tenth judicial district of the State of Minnesota for the county of Freeborn, in an action therein pending in that court between said petitioner, The Thorn Wire Hedge Company, as plaintiff, and one George A. Patrick, as defendant, and under indemnity furnished by said Thorn Wire Hedge Company, with said petitioners, J. W. Calkins, Aaron K. Stiles, and Gary G. Calkins, as bondsmen and sureties therein to such sheriff, pursuant to the statute in such case made and provided, and to save him harmless from all damages and costs for and on account of so doing; and accordingly said sheriff has duly notified said petitioners to defend this said action, and accordingly said petitioners, pursuant to the statute in such case made and provided, have duly intervened in said action as parties defendant thereto, and have duly made and filed in said action their pleading as such intervening parties defendant.

21 6. That, in virtue of said facts, said defendant, Jacob Larson, was at all such times and in all said matters, so far as said plaintiffs are concerned, the mere agent of said petitioners provided for them by law in such cases, and there can be a final determination of the controversy in said action, so far as concerns said petitioners without the presence of such agent, said defendant, Jacob Larson, and, in fact, the real controversy in said action is wholly between said plaintiffs on the one side and said petitioners on the other side, and the same can be fully determined as between them.

7. That your petitioners have reason to believe and do believe that, from prejudice as well as from local influence, they will not be able to obtain justice in said action in said State court.

Wherefore said petitioners pray that said action be removed into the United States circuit court to be held within and for the district of Minnesota, and herewith present the bond and surety as in such cases required.

THE THORN WIRE HEDGE CO., [L. S.]
By JNO. W. CALKINS, *Pres't.*
JNO. W. CALKINS. [SEAL.]
AARON K. STILES, [SEAL.]
By JNO. W. CALKINS, *His Agent.*
GARY G. CALKINS, [SEAL.]
By JNO. W. CALKINS, *His Agent.*

22 STATE OF MINNESOTA, } ss:
County of Freeborn, }

On this 22nd day of November, A. D. 1886, personally came before me J. W. Calkins, who, being by me first duly sworn, on his oath doth depose and solemnly swear that he is one of the petitioners named in and who signed the foregoing petition; that he signed the said petition for himself personally and for and on behalf of the Thorn Wire Hedge Company as president thereof, and also for

and on behalf of said Aaron K. Stiles and Gary G. Calkins as their duly authorized agent, and that the facts therein stated and the contents of said petition are true as therein stated.

JNO. W. CALKINS.

Subscribed and sworn to before me this 22nd day of November, A. D. 1886.

[NOTARY SEAL.] HENRY A. MORGAN,
Notary Public, Freeborn County, Minn.

Filed Nov. 23, 1886.

GEO. T. GARDNER,
Clerk of the District Court.

23 *Answer of Interveners.*

STATE OF MINNESOTA, *County of Freeborn:*

In District Court, Tenth Judicial District.

CASSIUS D. FULLER and BURT G. PATRICK, Plaintiffs,
against
JACOB LARSEN, Defendant, and THORN WIRE HEDGE COMPANY, J. W. CALKINS, AARON K. STILES, and GARY G. CALKINS, Interveners.

Now come the above-named Thorn Wire Hedge Company, J. W. Calkins, Aaron K. Stiles, and Gary G. Calkins and intervene in the above-entitled action, and deny each and every allegation, matter, fact, and thing in said complaint contained, whether as therein stated or otherwise, save as hereinafter stated or admitted, and thereupon allege—

1. That said Thorn Wire Hedge Company, one of the interveners above named, is a corporation of the State of Illinois, duly incorporated, created, and organized under and by virtue of the laws of said State, and at all of said times was and still is doing business therein under the corporate name of The Thorn Wire Hedge Company.

2. That heretofore, to wit, on the 7th day of October, A. D. 1885, in an action then duly pending in the district court of the
24 tenth judicial district of the State of Minnesota for the county of Freeborn, between said intervener, The Thorn Wire Hedge Company, plaintiff, and one George A. Patrick, defendant, brought for the recovery of money only, judgment was duly rendered, entered, and docketed in said court in said action in favor of said Thorn Wire Hedge Company, as plaintiff therein, and against George A. Patrick, as defendant therein, for the sum of $1,994.91, debt, interest, and costs of that suit.

3. That said defendant, Jacob Larsen, then was and still is the duly elected, qualified, and acting sheriff of said county of Freeborn.

4. That said George A. Patrick wholly failed, neglected, omitted, and refused to pay said judgment or any part thereof, except $500.00

paid thereon October 17th, 1885, $422.60 paid thereon December 31st, 1885, and $100.00 paid thereon April 29th, 1886.

5. That heretofore, to wit, on or about the 29th day of April, A. D. 1886, an execution against the property of said judgment debtor, George A. Patrick, was duly issued out of said district court for the tenth judicial district of said State for said county of Freeborn, under the seal thereof, directed to the sheriff of said county, whereby he was commanded to satisfy said judgment and execution, with interest and his fees, out of the personal property of said judgment debtor within said county of Freeborn, or if sufficient personal property could not be found, then out of the real property in said county belonging to said judgment debtor on the day when said judgment was docketed in said county or at any time thereafter, not exceeding ten years.

25 6. That while the said defendant, Jacob Larsen, was still the sheriff of said county of Freeborn, and after said judgment had been entered and docketed in said county as aforesaid, to wit, on the 12th day of June, A. D. 1886, he duly received said execution with request from said intervener, The Thorn Wire Hedge Company, to enforce the same.

7. That thereupon, and on said 12th day of June, A. D. 1886, said Jacob Larsen, as such sheriff, and under and by virtue of said writ of execution and not otherwise, duly levied upon all the property specified in said complaint and as the property of said judgment debtor, George A. Patrick, and afterwards, and upon and after due notice, as required by law, to wit, between the 31st day of July, A. D. 1886, and the 15th day of August, A. D. 1886, duly sold a sufficient amount of said property to pay the sum due on said judgment, with interest and costs, to wit, $1,464.46, and that thereafter, and on or about the 12th day of September, A. D. 1886, he delivered the balance of said property described in the complaint to George T. Gardner, he, the said George T. Gardner, being then and there the duly appointed, qualified, and acting receiver of the goods, chattels, property, and estate of said George T. Gardner, being then and there entitled to receive the goods and property so delivered to him as aforesaid.

8. That the value of the said property described in the complaint and so sold by said defendant, Jacob Larsen, under said execution did not exceed the sum of $1,464.46, for which the same was sold aforesaid, and that the value of the property so delivered to said George T. Gardner as aforesaid did not exceed the sum of $500.00.

26 9. That said plaintiffs herein claim the goods and property described in the complaint by and through a pretended and fraudulent transfer from said George A. Patrick to said plaintiffs, which said pretended and fraudulent transfer from said George A. Patrick to said plaintiffs was, as said interveners are informed and believe, made with intent and purpose on the part of said George A. Patrick and said plaintiffs of hindering, delaying, and defrauding the creditors of said George A. Patrick, and particularly said Thorn Wire Hedge Company, whose demand and claim aforesaid

existed before said pretended transfer was made, and was subsisting at the time thereof against said George A. Patrick, and, as said interveners are informed and believe, the said George A. Patrick and said plaintiffs fraudulently and secretly made such pretended and fraudulent sale and transfer with the intent and purpose of hindering, delaying, and defrauding said Thorn Wire Hedge Company and other creditors of George A. Patrick of their just claims and obligations against said George A. Patrick.

10. That said pretended sale and transfer was made without any consideration and without any actual or real change of possession of said property between said George A. Patrick and said plaintiffs.

11. That during and at the time of said pretended sale and transfer said George A. Patrick was insolvent and irresponsible, which fact was well known to said plaintiffs.

12. That all of said parties were then related to each other, acting in collusion and in privity with each other, and conspiring
27 together in all said matters with intent to cheat and defraud said intervener, The Thorn Wire Hedge Company, and other creditors of said George A. Patrick in whose name all of the merchandise aforesaid has been purchased.

13. That said plaintiffs, Cassius D. Fuller and Burt G. Patrick, in instituting this action merely represent and act as the secret agents of said George A. Patrick and for his exclusive use and benefit.

14. That when attached and levied upon as aforesaid the property aforesaid was the property of said George A. Patrick as to said interveners and the other creditors of said George A. Patrick, and that said pretended transfer thereof by said George A. Patrick to said plaintiffs was secret, without consideration, fraudulent, sham, and void.

15. That in making the levy of said execution and in selling said property under the same said sheriff acted under the express direction of said intervener, The Thorn Wire Hedge Company, and upon indemnity furnished to him by said Thorn Wire Hedge Company with said interveners, J. W. Calkins, Aaron K. Stiles, and Gary G. Calkins, as sureties and bondsmen therein, according to the statute in such cases made and provided, and in that behalf said interveners acted only after careful investigation in that behalf made by their attorneys, and upon a statement to them of all the apparent facts, and upon and pursuant to the advice of their said attorneys, and without any malice or want of probable cause or intent to wrong anybody, and solely with intent to obtain payment of a just debt due it from said George A. Patrick, and out of the property which he owned and had attempted to cover up, but which really belonged to him.

28 16. That said plaintiffs have not suffered or sustained any damage whatever by reason of any act or omission of said sheriff or of said interveners or either of them, either as alleged in said complaint or at all, either in the sum therein alleged or in any sum whatever.

17. That by reason of said facts said interveners, The Thorn Wire Hedge Company, J. W. Calkins, Aaron K. Stiles, and Gary G.

Calkins, are acting under the statute in such cases made and provided; are the parties primarily liable for the acts and doings of said defendant, Jacob Larson, and as such are interested in the matters in litigation in this action and in the success of the defendant therein and in resisting the claim of the plaintiffs therein.

Wherefore said Thorn Wire Hedge Company, J. W. Calkins, Aaron K. Stiles, and Gary G. Calkins intervene in this action, and pray that said plaintiffs take nothing by this action.

LOVELY, MORGAN & MORGAN,
Attorneys for Interveners, Albert Lea, Minn.

29 STATE OF MINNESOTA, } ss:
County of Freeborn, }

D. F. Morgan came before me personally, and, being duly sworn, doth say that he is one of the attorneys for the interveners in the above-entitled action; that the foregoing pleading is true to the best of his knowledge, information, and belief, and that the reason why this verification is not made by said one of said interveners is that they and each of them are absent from the county of Freeborn, Minnesota, where resides this affiant, one of the said attorneys.

D. F. MORGAN.

Subscribed and sworn to before me on this 13th day of November, A. D. 1886.

[NOTARY SEAL.] HENRY A. MORGAN,
Notary Public.

Filed Nov. 23, 1886.

GEO. T. GARDNER,
Clerk of the District Court.

30 *Reply to Bondsmen's Answer.*

STATE OF MINNESOTA, *County of Freeborn:*

In District Court.

CASSIUS D. FULLER and BURT G. PATRICK, Plaintiffs,
against
JACOB LARSON, Defendant, and THE THORN WIRE HEDGE COMPANY, J. W. Calkins, Aaron K. Stiles, and Gary G. Calkins, Impleaded with said Jacob Larson.

The said plaintiffs, replying to the petition and answer of the said Thorn Wire Hedge Company, J. W. Calkins, Aaron K. Stiles, and Gary C. Calkins, impleaded with the said defendant, Jacob Larson, herein—

1. Admit that a judgment, as they have been informed, was rendered and an execution issued against the George A. Patrick named in said answer, and that Jacob Larson, therein named, was the sheriff of said county at the time in that behalf stated in said answer.

2. Further replying to said answer, the said plaintiffs deny each and every allegation and matter contained in said answer and each and every part thereof, except as herein expressly admitted or qualified.

31 3. Further replying to said answer and to the allegations and matters set forth and contained in paragraphs numbered 9, 10, 11, 12, 13, 14, 15, and 17, the said plaintiffs deny each and every allegation and each and every portion thereof contained in said paragraphs and each and every of them. These plaintiffs deny that there was at the time or times stated in said answer and said paragraphs, or at any other time, any fraud or intent or purpose to defraud, or any intent or purpose to hinder or delay, any creditors of said George A. Patrick on the part of these plaintiffs or in any manner whatever. They further deny that there was at the time alleged in said answer, or at any time, any pretended sale or transfer of the property described in the complaint in this action between said George A. Patrick and these plaintiffs; but these plaintiffs allege that they were, during all the time mentioned in said complaint, the owners of said property and in possession thereof in good faith and for a valuable consideration paid therefor. They further deny that there was at the time and times stated in said paragraphs any secrecy or collusion or any fraud or fraudulent act, intent, or purpose on the part of these plaintiffs or said George A. Patrick in or about or respecting the stock and property described in said complaint in any manner whatever.

Further replying to said answer, the said plaintiffs, and as to the matters and things set forth in — paragraph of the same, No. 7, these plaintiffs deny that the George T. Gardner therein mentioned had at any time or has any right, title, or claim to the goods mentioned in the complaint in this action or to any part thereof.

32 These plaintiffs, further replying *and* to the matters and allegations contained in paragraph number eight (8) of said answer, deny that said goods therein mentioned were only of the value of the sum or sums therein stated, but allege that the value of the stock and goods was as alleged in plaintiffs' complaint herein.

JNO. WHYTOCK,
Plaintiffs' Attorney.

STATE OF MINNESOTA, } ss:
County of Freeborn, }

C. D. Fuller, being duly sworn, deposes and says that he is one of the plaintiffs in the above-entitled action; that the foregoing reply is true to his own knowledge, except as to the matters therein stated on his information and belief, and that as to those matters he believes it to be true.

C. D. FULLER.

Subscribed and sworn to before me Nov. 23, 1886.
[NOTARY SEAL.] W. E. TODD,
Notary Public, Freeborn County, Minn.

Filed Nov. 23, 1886.

GEO. T. GARDNER,
Clerk of the District Court.

33 STATE OF MINNESOTA, *County of Freeborn:*

The foregoing-entitled cause, having been removed to the United States circuit court for the district of Minnesota by an order filed in my office on the 23rd day of November, A. D. 1886—

I, Geo. T. Gardner, clerk of the district court for the county of Freeborn and State of Minnesota, do hereby certify that the foregoing is a true and correct copy of the summons, complaint, answer of the defendant, Jacob Larson, and the reply to the same, and the answer of the interveners and the reply to the same, the petition, bond, and order for the removal to the United States circuit court for the district of Minnesota, and that the foregoing are all the papers filed in said cause in this court.

In testimony whereof witness my hand and the seal of said court, at the city of Albert Lea, in said county, this 7th day of December, A. D. 1886.

[SEAL.]

GEO. T. GARDNER,
Clerk of said District Court.

Endorsed: Filed Dec. 11, '86. Oscar B. Hillis, clerk.

34 In the Circuit Court of the United States, District of Minnesota.

CASSIUS D. FULLER and BURT G. PATRICK, Plaintiffs,
vs.
JACOB LARSON, Defendant, and THE THORN WIRE HEDGE COMPANY, J. W. CALKINS, AARON K. STILES, and GARY G. CALKINS, Interveners.

We hereby consent to the substitution of Charles D. Kerr, of St. Paul, Minnesota, in our place and stead as attorney for the defendant and interveners in the above-entitled cause.

Dated December 7th, 1886.

LOVELY, MORGAN & MORGAN,
Att'ys for Def't and Interveners.

GENTLEMEN: Will you please take notice that, in pursuance of the foregoing consent, I have been substituted and now appear as attorney for the defendant and interveners in the foregoing-entitled action in the place and stead of Messrs. Lovely, Morgan & Morgan.

Dated December 8th, 1886.

CHA'S D. KERR,
Att'y for Def't and Interveners.

To John Whytock, Esq.

Endorsed: Filed Dec. 11, '86. Oscar B. Hillis, clerk.

[Endorsed:] Notice of substitution. Due and personal service of the within notice of substitution by delivery to us at Albert Lea,

Minn., on this day, of a true, full, and perfect copy thereof is hereby admitted. Dated at Albert Lea, Minn., this 10th day of Dec., A. D. 1886. Jno. Whytock, attorney for plaintiffs. Filed December 11, 1886. Oscar B. Hillis.

35 United States Circuit Court for the District of Minnesota.

Term Minutes, December Term, A. D. 1886. Dec. 14th, 1886.

CASSIUS D. FULLER *et al. vs.* JACOB LARSON.

This day come the plaintiffs and notice a motion to remand said cause from the State court, to be made on Monday, December 20th next.

OSCAR B. HILLIS, *Clerk.*

36 United States Circuit Court for the District of Minnesota.

Term Minutes, December Term, A. D. 1886. December 20th, 1886.

CASSIUS D. FULLER *et al. vs.* JACOB LARSON.

This day come the parties herein, by their respective attorneys, and plaintiffs' motion to remand this cause coming on to be heard the same is fully argued, duly submitted, and by the court taken under advisement.

OSCAR B. HILLIS, *Clerk.*

37 United States Circuit Court for the District of Minnesota.

Term Minutes, December Term, A. D. 1886. December 21st, 1886.

CASSIUS D. FULLER *et al. vs.* JACOB LARSON.

Plaintiffs' motion to remand this cause having been heretofore fully argued, duly submitted, and by the court taken under advisement:

Now, the court, after due consideration thereof and being fully advised in the premises, said motion is hereby sustained, and it is ordered that said cause be, and the same is hereby, remanded to the State court from whence it was removed.

OSCAR B. HILLIS, *Clerk.*

38 Know all men by these presents that we, Gilbert Gulbrandson, at the request of and for and on behalf of The Thorn Wire Hedge Company, J. W. Calkins, Aaron K. Stiles, and Gary G. Calkins, as principal, and Hans Gulbrandson and Viggar Gulbrandson, of Albert Lea, Freeborn county, State of Minnesota, as sureties, are hereby held and firmly bound unto Cassius D. Fuller and Burt G. Patrick in the sum of one thousand dollars, lawful money of the United States of America, to be paid unto the said Cassius D. Fuller and Burt G. Patrick, their representatives or assigns:

For which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 25th day of February, A. D. 1887.

The condition of the above obligation is such that whereas lately, at a general term of the circuit court of the United States in and for the district of Minnesota, in a suit depending in said court between said Cassius D. Fuller and Burt G. Patrick, as plaintiffs, and Jacob Larson, defendant, and The Thorn Wire Hedge Company, J. W. Calkins, Aaron K. Stiles, and Gary G. Calkins, interveners, a decision and judgment was rendered against the said interveners, The Thorn Wire Hedge Company, J. W. Calkins, Aaron K. Stiles, and Gary G. Calkins, remanding said cause to the district court of the State of Minnesota within and for the county of Freeborn, from whence it had been removed to said United States circuit court by the said interveners under the provisions of the act of Con-
39 gress in that behalf; and whereas said judgment and decision was so rendered on the 21st day of December, 1886, and the said Thorn Wire Hedge Company, J. W. Calkins, Aaron K. Stiles, and Gary G. Calkins having obtained a *suit* of error and filed a copy thereof in the clerk's office of the said court to reverse the said decision and judgment in the aforesaid suit, and a citation directed to the said Cassius D. Fuller and Burt G. Patrick, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington, at the general term thereof, March 26, 1887:

Now, the condition of the above obligation is such that if said Thorn Wire Hedge Company, J. W. Calkins, Aaron K. Stiles, and Gary G. Calkins shall prosecute said writ of error to effect and answer all damages and costs if they fail to make their plea good, then this obligation to be void, and otherwise to remain in full force and effect.

GILBERT GULBRANDSON. [SEAL.]
HANS GULBRANDSON. [SEAL.]
V. GULBRANDSON. [SEAL.]

Signed, sealed, and delivered in presence of—
D. F. MORGAN.
JNO. WHYTOCK.

40 STATE OF MINNESOTA, *County of Freeborn:*

Gilbert Gulbrandson, Hans Gulbrandson, and Viggar Gulbrandson, being by me first duly sworn, say (each for himself) that he is a freeholder, residing in the State of Minnesota, and worth the sum of two thousand dollars over and above debts, liabilities, and property exempt by law.

GILBERT GULBRANDSON. [SEAL.]
HANS GULBRANDSON. [SEAL.]
V. GULBRANDSON. [SEAL.]

Subscribed and sworn before me this 25th day of February, 1887.

D. F. MORGAN,
U. S Commissioner, District Minnesota.

I am satisfied with the foregoing bond and sworn justification of the sureties.

Dated Feb'y 25th, 1887.

JNO. WHYTOCK,
Attorney for Plaintiffs, Cassius D. Fuller and Burt G. Patrick.

I hereby approve the within bond and the sureties thereon.

Dated Feb. 26, '87.

R. R. NELSON, *Judge.*

Endorsed: Filed Feb. 26, '87. Oscar B. Hillis, clerk.

41 *Assignment of Errors.*

Supreme Court of the United States.

CASSIUS D. FULLER and BURT G. PATRICK, Plaintiffs,
vs.
JACOB LARSON, Defendant, and THE THORN WIRE HEDGE COMPANY, J. W. CALKINS, AARON K. STILES, and GARY G. CALKINS, Interveners.

In error to the circuit court of the United States for the district of Minnesota.

Now comes the Thorn Wire Hedge Company, Aaron K. Stiles, J. W. Calkins, and Gary G. Calkins, by Chas. D. Kerr, their attorney, and say that in the rendition of judgment and proceedings in the said cause in the said circuit court remanding said cause to the State court, from whence it was removed, to said United States circuit court by said interveners, under the act of Congress of 1875 in that behalf, there is manifest error, in this, to wit:

The said circuit court erred in so remanding said cause, because the said interveners are all citizens of a different State from the plaintiffs in said action, as well as from the defendant, Larson, therein, and there is a separate controversy between said interveners and said plaintiffs, and also between said interveners and said defendant Larson.

42 Wherefore the said Thorn Wire Hedge Company, J. W. Calkins, Aaron K. Stiles, and Gary G. Calkins, by their attorney aforesaid, pray that the said judgment of the said circuit court may be in all things revised, and that said cause may be remanded to the said circuit court, to the end that there may be therein done what of right and according to the opinion and judgment of the said Supreme Court ought to be done.

Dated Feb'y 26th, 1887.

CHAS D. KERR,
Attorney for the Thorn Wire Hedge Company, J. W. Calkins, Aaron K. Stiles, Gary G. Calkins, Interveners and Plaintiffs in Error.

[Endorsed:] Filed Feb. 26, 1887. Oscar B. Hillis, clerk.

43 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Cassius D. Fuller and Burt G. Patrick, plaintiffs, and Jacob Larson, defendant, and The Thorn Wire Hedge Company, J. W. Calkins, Aaron K. Stiles, and Gary G. Calkins, interveners, a manifest error hath happened, to the great damage of the said The Thorn Wire Hedge Company, J. W. Calkins, Aaron K. Stiles, and Gary G. Calkins, interveners, as is said, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the 26th day of March next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 26th day of Feb-
44 ruary, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the 110th year.

OSCAR B. HILLIS,
Clerk of the Circuit Court of the United States of America for the District of Minnesota,
[SEAL.] By L. P. RICHARDSON, *Deputy.*

Allowed Feb'y 26th, 1887.

R. R. NELSON, *Judge.*

Copy lodged in clerk's office, Feb'y 26, '87, for defendant.

[Endorsed:] Filed Feb. 26th, 1887. Oscar B. Hillis, clerk.

45 UNITED STATES OF AMERICA, *ss:*

To Cassius D. Fuller and Burt G. Patrick, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the 26th day of March, 1887, next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eighth circuit and district of Minnesota, wherein you, Cassius D. Fuller and Burt G. Patrick, are defendants in error and The Thorn Wire Hedge

Company, J. W. Calkins, Aaron K. Stiles, and Gary G. Calkins are plaintiffs in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable judge of the circuit court of the
46 United States for the district of Minnesota this 26th day of February, A. D. 1887.

R. R. NELSON, *Judge.*

End.: 402, D. law. U. S. Sup. Court. Cassius D. Fuller *et al.*, pl'ff's, *vs.* Jacob Larson, def't, and Thorn Wire Hedge Co., interveners. Citation on writ of error. Filed M'ch 2, 1887. Oscar B. Hillis, clerk.

Due service of a true copy of within citation is hereby admitted this 28th day of February, A. D. 1887.

JNO. WHYTOCK,
Att'y for Pl'ffs.

47 UNITED STATES OF AMERICA, }
District of Minnesota, } *ss:*

Circuit Court of the United States.

I, Oscar B. Hillis, clerk of said circuit court, do hereby certify and return to the honorable the Supreme Court of the United States that the foregoing, consisting of 46 pages, numbered consecutively from 1 to 46, inclusive, is a true and complete transcript of the records, process, pleadings, orders, final order, and all other proceedings in said cause, and of the whole thereof, as appears from the original records and files of said court; and I do further certify and return that I have annexed to said transcript, and included within said paging, the original citation, together with the proof of service thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Saint Paul, in the district of Minnesota, this 30th day of March, in the year of our Lord one thousand eight hundred and 87, and of the Independence of the United States the one hundred and 11th year.

[Seal of the U. S. Circuit Court, Dist. of Minnesota.]

OSCAR B. HILLIS, *Clerk,*
By L. P. RICHARDSON, *Deputy.*

48 [Endorsed:] United States circuit court, district of Minnesota. Cassius D. Fuller *et al. vs.* Jacob Larson. Return to Supreme Court.

Endorsed on cover: Minnesota C. C. U. S. No. 1371. The Thorn Wire Hedge Company, J. W. Calkins, Aaron K. Stiles, and Gary G. Calkins, plaintiffs in error, *vs.* Cassius D. Fuller and Burt G. Patrick. Filed April 4, 1887.

122-535

SUPREME COURT U.S.
FILED
APR 22 1887
JAMES H. McKENNEY,
CLERK.

UNITED STATES

SUPREME COURT.

DISTRICT OF MINNESOTA.

CASSIUS D. FULLER AND BURT C. PATRICK,
Defendants in Error, Plaintiffs,

vs.

JACOB LARSON,
Defendant,

And the THORN WIRE HEDGE COMPANY, J. W. CALKINS, AARON K. STILES and GARY G. CALKINS,
Intervenors and Plaintiffs in Error.

Argument of Plaintiff in Error.

KERR & RICHARDSON,
Att'ys for Plaintiffs in Error.

J. W. Cunningham & Co. Print, St. Paul, Minn.

Company, J. W. Calkins, Aaron K. Stiles, and Gary G. Calkins are plaintiffs in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable judge of the circuit court of the
46 United States for the district of Minnesota this 26th day of February, A. D. 1887.

R. R. NELSON, *Judge.*

End.: 402, D. law. U. S. Sup. Court. Cassius D. Fuller *et al.*, pl'ff's, *vs.* Jacob Larson, def't, and Thorn Wire Hedge Co., interveners. Citation on writ of error. Filed M'ch 2, 1887. Oscar B. Hillis, clerk.

Due service of a true copy of within citation is hereby admitted this 28th day of February, A. D. 1887.

JNO. WHYTOCK,
Att'y for Pl'ffs.

47 UNITED STATES OF AMERICA, } ss:
District of Minnesota, }

Circuit Court of the United States.

I, Oscar B. Hillis, clerk of said circuit court, do hereby certify and return to the honorable the Supreme Court of the United States that the foregoing, consisting of 46 pages, numbered consecutively from 1 to 46, inclusive, is a true and complete transcript of the records, process, pleadings, orders, final order, and all other proceedings in said cause, and of the whole thereof, as appears from the original records and files of said court; and I do further certify and return that I have annexed to said transcript, and included within said paging, the original citation, together with the proof of service thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Saint Paul, in the district of Minnesota, this 30th day of March, in the year of our Lord one thousand eight hundred and 87, and of the Independence of the United States the one hundred and 11th year.

[Seal of the U. S. Circuit Court, Dist. of Minnesota.]

OSCAR B. HILLIS, *Clerk,*
By L. P. RICHARDSON, *Deputy.*

48 [Endorsed:] United States circuit court, district of Minnesota. Cassius D. Fuller *et al. vs.* Jacob Larson. Return to Supreme Court.

Endorsed on cover: Minnesota C. C. U. S. No. 1371. The Thorn Wire Hedge Company, J. W. Calkins, Aaron K. Stiles, and Gary G. Calkins, plaintiffs in error, *vs.* Cassius D. Fuller and Burt G. Patrick. Filed April 4, 1887.

122-535

Supreme Court U.S.
FILED
APR 22 1887
JAMES H. McKENNEY
CLERK

UNITED STATES

SUPREME COURT.

DISTRICT OF MINNESOTA.

CASSIUS D. FULLER AND BURT C. PATRICK,
Defendants in Error, Plaintiffs.

vs.

JACOB LARSON,
Defendant,

And the THORN WIRE HEDGE COMPANY, J. W. CALKINS, AARON K. STILES and GARY G. CALKINS,
Intervenors and Plaintiffs in Error.

Argument of Plaintiff in Error.

KERR & RICHARDSON,
Att'ys for Plaintiffs in Error.

J. W. Cunningham & Co. Print, St. Paul, Minn.

UNITED STATES SUPREME COURT, }
DISTRICT OF MINNESOTA. } ss.

CASSIUS D. FULLER AND BURT C. PATRICK,
Defendants in Error, Plaintiffs,

vs.

JACOB LARSON,
Defendant,

And the THORN WIRE HEDGE COMPANY, J. W. CALKINS, AARON K. STILES and GARY G. CALKINS,
Intervenors and Plaintiffs in Error.

ARGUMENT OF PLAINTIFF IN ERROR.

In this case Larson, as sheriff of Freeborn county, Minnesota, under an execution, in an action wherein the Thorn Wire Hedge Company were plaintiffs, and one George A. Patrick was defendant, levied upon a stock of merchandise as the property of said defendant.

The Statutes of Minnesota, (sec. 154, chap. 66, page 730) provide that when property so levied on is claimed by any other person than the defendant, such person shall make and serve upon the sheriff an affidavit of ownership, stating the value of the property and the

grounds of his claim thereto, and that the sheriff may then release the property to the defendant, unless the plaintiff indemnify the sheriff with bond, etc.

The Statute further provides, (Sec. 155) that such bond having been given, if the person claiming the ownership of such property commences an action against the sheriff for the taking thereof, the plaintiff in the execution, and his bondsmen shall, on motion of the sheriff, be impleaded with him in such action.

The plaintiffs, herein, claimed the property levied on, and under this Statute the Thorn Wire Hedge Company, plaintiff in the original action, upon the request of the sheriff, executed to him a bond of indemnity with J. W. Calkins, Aaron K. Stiles, and Gary G. Calkins as sureties, after which the sheriff proceeded to sell the property levied on.

The claimants, plaintiffs in this action, thereupon commenced suit against the sheriff alone for damages for the taking and conversion of said property.

The said Thorn Wire Hedge Company, and its bondsmen, Calkins, Stiles and Calkins, thereupon intervened and interpleaded in said suit, and separate issue was joined on their interpleader by the plaintiffs.

The plaintiffs herein, Fuller and Patrick, and the defendant, Larson, the sheriff, are citizens of the State of Minnesota. The intervening defendants, the Thorn Wire Hedge Company, Calkins, Stiles and Calkins, are citizens of the State of Illinois. As such they have removed the case to this court claiming,

First—That there is a controversy separable in its character, between them and the defendant, Larson, which it is their right to have tried in the federal court under the act of 1875.

Second—That there is a separate controversy between them and the plaintiff, which can be fully determined without the presence of any of the other parties in the cause.

The method of intervention and the antecedent steps do not clearly appear from the records transmitted from the state court, but the petition for removal states that the bond and intervention were pursuant to notification from the sheriff and under the Statute in such case made and provided.

We will assume, therefore, that this is a case where the statutory affidavit of ownership, etc., was served by the plaintiffs on the sheriff, and that the statutory bond of indemnity was given to him by the execution creditor who has intervened under sec. 154, chap. 66, Statutes of Minnesota.

The Statute under which this intervention was made, is construed in

Lasher vs. *Getman*, 30 Minn., 321.

The Court say: P. 328.

"This action, as it was commenced by the plaintiff against the sheriff alone, was the ordinary proceeding by which compensation for a wrong done was sought to be recovered against a party who had committed the wrong.

The steps taken under the Statute, by which other parties were subsequently impleaded with the defendant, must obviously be regarded either:

1st. As a proceeding for the benefit of the plaintiff; that is, that such added parties might be compelled to respond to the plaintiff in damages for a wrong for which they were legally liable to the plaintiff, just as

though they had been originally sued as joint wrong doers with the sheriff, or

2d. The proceeding was for the benefit of the defendant in such action (the sheriff) so that, in the same action which should determine his liability to the plaintiff, there might be determined and enforced such right of indemnity or reimbursement as he might have against them on account of the alleged tort, for which he was sued.

A consideration of the prior existing law and of this Statute, will lead to the conclusion that the *latter* of these alternative propositions expresses the object of the Statute.

First—The plaintiff needed no statutory intervention to enable him to maintain an action for the wrong against any or all whom the law made answerable for such wrong.

Second—The proceeding for bringing in these parties is not to be taken until after an action has been commenced against the sheriff.

There is nothing in the Statute suggesting that the action may not be properly commenced and prosecuted against the officer alone, as one might always prosecute one of several joint wrong doers.

Third—The new parties are brought in only at the instance, and upon the application of the defendant, and the plaintiff has nothing to do concerning it. He cannot invoke the joinder of the parties. They may be brought in even against his will.

Fourth—The persons who may be joined as parties under the Statute are only those against whom the sheriff may assert a right of indemnity," etc., etc.

After a further discussing at length, the Court adds: P. 331.

"Our conclusion is that the purpose of the Statute in providing for bringing in these parties defendant, was not the enforcing in favor of the plaintiff of a liability in tort, but rather to enforce, for the benefit of the sheriff such right of indemnity as may exist in his favor.

By the Statutory procedure, this right, otherwise only enforcible by a separate action, brought by the sheriff after the recovery had been had against him, is now made available in the same action which determines his own liability. By this means circuity of action is avoided,"

It should not affect the result that the same parties whose contract liability to the sheriff it is the object of the Statute to enforce, might have been held responsible to the plaintiff in tort if he had elected to pursue his remedy against them. The fact is foreign to the purposes and scope of the action, either as it was commenced against the sheriff alone, or at the later stage, when the defendant caused his indemnitors to be impleaded with him.

It follows from the premises that the liability of the appellants (intervenors) in this action is measured by the terms of the contract of indemnity, and that the law relating to the responsibility of joint wrong doers, or of those who adopt and ratify the wrongful acts of others, committed in their behalf, does not indicate the rule or measure of damages to be adjudged against the appellants, so far as they are concerned, it is, except as to the form of the proceedings, and of the judgment, as though this was an action prosecuted by the sheriff

upon the indemnity bonds, after his right to recover upon them had been established.

Hence the amount of the recovery against the principals and sureties in the bond is limited to the penal sum named therein, with interest from the time when their liability became fixed and ascertained."

From this authority, we think it is apparent, without argument, that there is a separate controversy here between the intervenors, Thorn Wire Hedge Company and its bondsmen on the one side, and the sheriff, Larson, on the other, which either of said parties had a right to remove to the Federal Court.

The liability of the intervenors to the sheriff upon their bond of indemnity is to be determined, this is ex-contractu, and is limited by the amount of the bond.

II.

There is another phase of this controversy between the intervenors and the sheriff, Larson.

The complaint, in effect, alleges a malicious, wrongful and wanton abuse of his process on the part of the sheriff. Now it is clear that the Statute we have cited does not contemplate the giving of a bond by the execution plaintiff to indemnify the sheriff against such acts as these, nor did the bond in this case have any such effect, nor are the intervening defendants who seek their rights in this Court responsible for such conduct on the part of the sheriff.

Manifestly then, judgment might, in this case, be recovered against the sheriff and yet the non-resident intervenors go free, which brings the case within the reasoning of

Buttel vs. *C. M. & St. P. R'y Co.*, 26 Fed. Rep. page 52.

The plaintiffs here saw fit to sue the sheriff in a form of action peculiarly personal, and for acts not within the protection of his writ. He was not sued merely for the value of the goods and proximate damages, as I think is contemplated by the Statutes, but for the wanton and malicious abuse of his process.

Moreover the answer of the sheriff alleges that all of the property not sold under the execution was delivered by him to one Gardner, the receiver of the execution defendant. The reply denies this, and alleges that on the contrary the sheriff kept all the property not sold under the execution, and converted same to his own use, and that the goods so converted were worth at least $1,500.00.

Here is a cause of action against the sheriff with which the intervening defendants could have no possible connection, and for which they could in no way be held accountable. There is no averment, and there could be no proof connecting the intervening defendants, with such lawless and unwarranted action on the part of the sheriff.

So, that if the allegations of the plaintiff are true, they could recover a far greater judgment against the sheriff than they would in any event be entitled to against the intervenors.

As I have intimated, it is not clear from the record sent up by the State Court under what Statute the intervention in this suit was made.

But however made, the intervenors may not only resist the claim of the plaintiff, but they may have such

relief as the facts may warrant against their co-defendant.

The rights of the defendants *inter se* may be adjudicated.

The Statute of Minnesota provides that the court shall grant to the respective parties the relief warranted by the facts pleaded regardless of the relief formally prayed for.

It has also become the well established law upon the question of removal to the Federal Court that for the purpose of such removal the parties may be transferred and arranged in their proper positions, with reference to their interest in the controversy, without regard to their formal position as plaintiffs or defendants on the record.

Bank vs. *Flood*, 6 Sawyer, 220.

And after the parties have been so arranged, if there exists in the suit a controversy between any of the parties, (even if it is not the main controversy in the suit), which is wholly between citizens of different states, and which can be fully determined as between them, then any one of said parties can remove the suit.

And this, although there may be other defendants, or parties actually interested in the controversies embraced in the suit.

Bybee vs. *Hackett*, 5 Fed. Rep., 6.

III.

Aside from this separate controversy between the intervenors and their co-defendant, Larson, we think the controversy between them and the plaintiffs is separable in its nature

The effect of such an intervention as this, is to shift from the sheriff to the intervenors the entire burden and responsibility of the suit, so far as the official action of the officer is concerned.

He, indeed, is supposed to have always stood neutral between the parties. He is supposed to have simply obeyed the mandates of the law in the execution of its process, to have done only what the law compelled him to do, after the indemnity required by law had been furnished by the execution plaintiffs.

The Statute makes the intervenors primarily liable, and provides that if any judgment is obtained it shall be satisfied out of their property, and only in the event of their having nothing from which the execution can be enforced, shall anything be collected from the sheriff :—in other words, the sheriff is held accountable only for the solvency of his indemnifiers.

The moment the intervention is made the sheriff becomes, to all intents and purposes, a merely formal or nominal party. The real controversy thenceforth is with the intervenors, and the presence of the sheriff, who is conditionally liable, is not necessary to its determination.

The case of *Green* vs. *Klinger*, 10 Fed. Rep., 689, is closely in point. The Statute of Texas provides as follows:

"When a party is sued for land, the real owner or *warrantor* may make himself, or be made, a party defendant in the suit, and shall be entitled to make such defense as if he had been the original defendant in the action."

The suit was brought in a State Court of Texas to

try title to land, with respect to which one Hamilton was grantor and warrantor of title to the defendant.

Hamilton (a citizen of another state) intervened and removed the cause. The plaintiff and all the rest of the defendants were citizens of Texas.

The Court says:

"The controversy was wholly between Hamilton and citizens of a different state, and no other defendant appears to have been interested in the controversy, except adversely to him. It further is shown that there was a controversy between Hamilton and the other defendants, all citizens of a differet state from Hamilton, because it appeared that under the Statute Hamilton was brought into the case and made a party defendant on the motion of the other defendants. Counsel very earnestly insists that the plaintiff has no controversy with Hamilton, and asks no judgment nor relief against him. This may be true, and yet not effect the question, as we have seen in *Barney* vs. *Latham*, that if the proper controversy exists, and the proper steps are taken, the entire suit may be removed.

Where the tenant is sued and the landlord is brought in, or where the grantee is sued and the warrantor is brought in, the whole burden falls on the landlord or warrantor, as the case may be, and if the plaintiff recovers while the tenant or grantee is evicted, the landlord or warrantor is bound to him for his damages."

And the same in effect is held good in

Green vs. *Kingsley*, 10 Cent. L. J., 47.

A similar Texas Statute is again construed in the

State of Texas vs. *Lewis*, 12 Fed. Rep., 1.

Where the Court holds that when the landlord does intervene he becomes the real defendant, and thereafter

the tenant becomes a nominal party merely and the case is removable by the landlord, he being a citizen of another state.

That such an intervention presents a separate controversy between the intervenors and the plaintiff, is still more pointedly held in the case entitled:

"*In re the Iowa and Minn. Con. Co.*, 10 Fed. Rep., 401.

Upon general principles, and independent of the Statutes, we claim that when such a bond of indemnity has been given by the execution plaintiff, he thenceforth becomes the substantial defendant between whom and the person claiming the goods levied on, there is a separate controversy.

Beuttel vs. *C., M. & St. P. R'y Co.*, 26 Fed. Rep. 50.

Mayer et al. vs. *Steamboat Co.*, 24 Fed. Rep., 817

Town of Ann vs. *Auditor*, 9 Biss., 289.

In the *Removal Cases*, 100 U. S., 457.

It is clearly held that if the suit at the time of the removal had assumed such a phase, that the resident defendant had become in effect a nominal party merely, while the non-resident defentant was the real party in interest, the case would be removable.

The same is held in

Wood vs. *Davis*, 18 How., 457.

Sioux City R'y Co. vs. *C., M. & St. P. R'y Co.*, 27 Fed. Rep., 771.

Foss vs. *Bank*, 1 McRary, 474.

The case of *Allen* vs. *Ryerson*, 2 Dillon, 501, is closely in point.

The plaintiff, Allen, was a citizen of Iowa. He claimed to be the owner of certain machinery which had been levied on by the sheriff (also a citizen of Iowa) under an execution in favor of Ryerson, a citizen of Illinois.

Allen sued the sheriff and Ryerson, asking an injunction and also damages for the siezing of the property. Ryerson removed the cause to the U. S. Court. Motion to remand.

The Court says:

"The substantial controversy as disclosed by the pleadings, is one between plaintiff and Ryerson; judging from the case as made by the pleadings, we think there can be a final determination of the controversy without the presence of the sheriff.

If the plaintiff maintains his bill, the decree will restrain the defendant, Ryerson and his agents and attorneys, which will include the sheriff, from further interference with plaintiff's property, and the Court may, if ground of equitable jurisdiction exists, also ascertain and award the plaintiff damages caused by the acts of the sheriff under Ryerson's directions If such a decree be satisfied, this will end the case as respects the sheriff. If Ryerson shall succeed in this Court, and the bill be dismissed on the merits, this will dispose of the plaintiff's case against the sheriff in the state Court."

IV.

It will be observed that in all of the *Removal Cases*, 100 U. S.. 457, suit was commenced by the plaintiff against both the resident and non-resident defendants.

He had elected, so far as it lay in his power, to recover against them jointly.

Those cases, and all which have followed in the same line, have proceeded upon the reasoning, that although liability in tort is several, as well as joint, yet the plaintiff having elected to make it joint, it did not lie in the power of any of the defendants to make it several, so as to create the separate controversy necessary as a ground work of removal under the act of 1875.

This reasoning is not applicable in the case at bar, because the plaintiff did not *elect* to sue the defendants *jointly*. His election, so far as he could exercise it, was precisely the contrary. He made his cause of action several and cannot now claim that it is joint by virtue of any election on his part.

Moreover, the non-resident defendant, by his intervention, has tendered to this plaintiff a separate and distinct controversy on the question of fraud, upon which separate controversy the plaintiff, by his reply, has joined issue, and he cannot now prevent the intervening defendants from removing that controversy to this Court. He is without the logic, and therefore without the application of the decision in *Tdvt* vs. *Carson*.

This is plainly indicated in *Boyd* vs. *Gill*, 19 Fed. Rep., p. 149.

It is settled that the law of 1866 is practically repealed by the law of 1875.

Hyde vs. *Rublee*, 104 U. S., 407.
King vs. *Connell*, 106 U. S., 395.

But it is distinctly held in *Barney* vs. *Latham*, supra, that the second section of the act of 1875 was intended to accomplish the same thing as the act of

1866, and to extend the privilege to plaintiffs, as well as defendants, and instead of simply the separable controversies being moved, to remove in such cases the whole suit to the federal court.

It is also held in this case that any suit may be removed under the act of 1875, where the resident defendant is not an indispensable party, although he may be a proper party.

The same is held in *Corbin* vs. *Boies*, 18 Fed. Rep., 3.

Under these decisions we claim that the sheriff in this case, while a proper party no doubt, is not an indispensable party to the controversy between the intervening defendants and the plaintiff.

That such controversy is clearly marked out and defined in the answer of the intervening defendants, and the reply thereto by the plaintiffs, and can be finally determined in this court as between them without the presence of the defendant sheriff.

V.

With respect to the controversy between the plaintiffs and the intervenors, we can illustrate our position by a transposition of the parties.

Suppose the facts as to citizenship to exist just as they are, the intervenors come in against the will of the plaintiffs, and in spite of anything they could do to prevent it.

Could not the plaintiffs remove the case to the federal court on the separate controversy raised by the intervenors.

Or further transposing.

Suppose the plaintiffs, Fuller and Patrick, had been citizens of Illinois, and had sued the sheriff alone, he being a citizen of Minnesota, it may be with the express purpose and intent of removing the case to the federal court. Could the Thorn Wire Hedge Company, by intervening as it has, prevent such removal on the ground that it is a citizen of the same State as plaintiffs.

Or transposing further.

Suppose the plaintiffs, being citizens of Minnesota, had sued the Thorn Wire Hedge Company, citizens of Illinois, alone for the Tort, as they certainly might have done, if they could find them within the jurisdiction of the State Court. Suppose then the sheriff had intervened, as he might do, under sec. 131 of chap. 66, of the Statutes of Minnesota.

Could he, in that way, prevent either the plaintiff or defendant in the action as originally brought from removing the controversy, as between them, to the Federal Court?

Suppose the property had been converted by an agent simply of the Thorn Wire Hedge Company, and under their direction, and after a bond of indemnity by them furnished, that the agent was a citizen of Illinois, and the claimants of the property, and the Thorn Wire Hedge Company were each citizens of Minnesota.

The claimants bring suit against the agent alone. Here would be a case clearly removable.

Could the Thorn Wire Hedge Company by intervening, as we have seen they might under our Statute, so far convert the action into one against joint Tort-feasors, as to prevent its removal, under the reasoning of the decision iu the removal cases. If not then we claim as a logical deduction that the intervention as made in the

suit at bar, does not convert the action into one against the defendant and the intervenors jointly, so as to prevent a removal to the Federal Court of the controversies raised by the intervention.

We think the Court below erred in granting the motion to remand.

KERR & RICHARDSON,
Attorneys for Plaintiffs in Error.

It has been intimated by the counsel for the defendants in error, that he will contend that the intervention in this case was not made under the statute heretofore cited and referred to in 30th of Minnesota.

In reply to this, we have to say: That said statute is the only one in the State of Minnesota, which authorizes such intervention: that is, an intervention by way of answer. The only other statute of the State providing for interventation at all, is Section 131 of Chapter 66, of the General Statutes of 1878. Under this section the intervention must be by complaint, and all the rights of the parties *inter se*, defendants as well as plaintiffs, may be determined, in case of such intervention.

If the answer of the intervenors here is to be considered as a *complaint* under that statute, it will hardly be denied that it raises a separate controversy with both plaintiffs and defendant Larsen, such as is contemplated by the removal act of 1875.

Kerr & Richardson
Attys for Plff. in Error

122-535

U. S. SUPREME COURT.

THE THORN WIRE HEDGE COMPANY, J. W. CALKINS, AARON K. STILES, and MARY C. CALKINS, Plaintiffs in Error,

VERSUS

CASSIUS D. FULLER and BURT C. PATRICK, Defendants in Error.

Brief of Defendants in Error

THOMAS WILSON,
of Counsel for Defendants in Error.

U. S. SUPREME COURT.

THE THORN WIRE HEDGE COMPANY, J. W. CALKINS, AARON K. STILES, and MARY C. CALKINS, Plaintiffs in Error,

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CASSIUS D. FULLER and BURT C. PATRICK, Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

This suit was begun in the District Court of Freeborn County, in the State of Minnesota, by these defendants in error against Jacob Larson, for the illegal taking and conversion of certain personal property of the plaintiffs (these defendants in error) valued at $1500.

Larson answered alleging that there was rendered in said county a judgment in favor of the Thorn Wire 1
Hedge Company—one of the plaintiffs in error—against one George A. Patrick, and that an execution on that judgment having been issued to him as sheriff of that county, he, as such sheriff, levied on the goods in question to sat-

isfy the same, which goods he alleged belonged to the defendant in said execution, and that the levy and sale thereunder were the taking complained of.

2 The plaintiffs in error thereupon intervened, alleging the rendition of the judgment, the issue and levy of the execution and the sale thereunder of the goods, and that the goods taken and sold were the property of George A. Patrick, the judgment debtor as aforesaid.

They further alleged

"That in making the levy of said execution and in sell-
3 ing the said property under the same, the said sheriff (Larson) acted under the express direction of said intervenor, The Thorn Wire Hedge Company, and upon indemnity furnished him by said Thorn Wire Hedge Company, with said intervenors, J. W. Calkins, Aaron K. Stiles and Gary G. Calkins as sureties and bondsmen according to the statute in such case made and provided in that behalf; that said intervenors acted * * without any malice or want of probable cause or intent to wrong anybody, and solely with intent to obtain payment of a just debt due it from said George A. Patrick, and out of the property which he owned and had attempted to cover up, but which really
4 belonged to him. * * * That by reason of said facts, said intervenors, the Thorn Wire Hedge Company, J. W. Calkins, Aaron K. Stiles, and Gary C. Calkins, acting under the statute in such cases made and provided, are the parties primarily liable for the acts and doings of said defendant Jacob Larson, and as such are interested in the matters in litigation in this action and in the success of the defendant therein and in resisting the claim of the plaintiffs therein. Wherefore said Thorn Wire Hedge Company, J. W. Calkins, Aaron K. Stiles and Gary G. Calkins intervene in this action and pray that said plaintiffs take nothing by this action."

5 On petition of the intervenors—*Larson not joining*—the cause was removed to the United States Circuit Court under the act of 1875, and on motion of the plaintiffs (below) in the United States Circuit Court, the case was remanded to the state court; and the case is here on writ of

error sued out by said intervenors—*Larson not joining*—to review the remanding order.

It will be observed that the intervenors (these plaintiffs in error) came into this suit on their own motion *merely to aid Larson in his controversy with these defendants in error.* By their intervention Larson is not eliminated from the litigation nor is his liability to the plaintiffs below at all lessened. He is the defendant against whom the plaintiffs (below) proceeded, and on whose ability to respond in damages they rely. Plaintiffs below have made no claim —have no desire to proceed, against these intervenors; and these intervenors have no status in court—no right to inject themselves into this litigation—except as auxiliaries of Larson. Their right to intervene is a mere incident to the suit between the principal parties. They cannot compel the plaintiffs (below) to sue them or to rely on a judgment against them; nor can they deprive plaintiffs below of their right to sue Larson for the trespass complained of.

The plaintiffs in this suit and the *real* defendant, Larson, are citizens of Minnesota, and therefore, within both the letter and spirit of the law, the case was properly remanded to the state court.

Sloane vs. Anderson, 117 U. S., 275.

The pleading of the intervenors from which I have above quoted at length, is a sufficient answer to the contention of the learned counsel for the plaintiffs in error that there is a controversy between the intervenors and Larson. They do not *even pretend*, as their petition shows,

that there is any such controversy; much less do they
10 pray for any judgment or relief against him.

SECONDLY.

Larson, the real defendant, neither joined in the petition for removal from the state court, nor in the writ of error sued out by the intervenors to review the remanding order. He being a necessary and *the only necessary party defendant* in the litigation, and the intervenors being unnec-
11 essary parties, their presence does not confer jurisdiction on the United States Circuit Court, nor can they, without the concurrence of the real party defendant, either remove the case or prosecute the writ of error.

THIRDLY.

It is conceded that the presence of merely nominal,
12 formal, or unnecessary parties has no effect to either confer or exclude jurisdiction; and therefore it is deemed unnecessary te review or refer *seriatim* to the many authorities cited by the learned counsel for plaintiffs in error declaratory of this position.

FOURTHLY.

13 Counsel for plaintiffs in error claims that it may be inferred that the intervenors came into this suit in pursuance of the provisions of sections 154 and 155, Chapter 66, General Statutes of 1878, a copy of which sections is appended to this brief, but it is clear that the intervention was not under these sections, but under section 131 of said Chapter, which is in the following words:

"Intervention—Any person who has an interest in the matter at litigation, in the success of either of the parties to the action, or against either or both, may become a party to any action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, or either of them, either before or after issue has been joined in the cause, and before the trial commences. The court shall determine the issues made by the intervention at the same time that the issue in the main action is decided, and the intervenor has no right to delay; and if the claim of the intervenor is not sustained, he shall pay all the costs of the intervention. The intervention shall be by complaint, which must set forth the facts on which the intervention rests; and all the pleadings therein shall be governed by the same principles and rules as obtain in other pleadings. But if such complaint is filed during term, the court shall direct a time in which an answer shall be filed thereto."

It will be observed that the intervenors have followed very closely even the language of this section in their petition. While they might, if the facts had justified it, have demanded some relief adversely to both the plaintiffs and defendant, or either, they did not do so. They pursued one of the other courses open to them under the statute—"*by uniting with the defendant in resisting the claim of the plaintiff.*"

It is unnecessary, therefore, to follow the counsel for plaintiffs in error in the discussion of the meaning and effect of sections 154 and 155. But it may properly be added that even if the intervention was under those sections, the case here would not be at all different in principle.

THOMAS WILSON,

Of Counsel for Defendants in Error.